Petition

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,

81-1401

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DONALD SCHMIDT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

EDWARD M. KAY, ESQUIRE
D. ROBERT SILBER, ESQUIRE
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QUESTION PRESENTED

WHETHER THE PETITIONER'S RIGHT TO DUE PROCESS WAS VIOLATED BY THE GOVERNMENT'S VERBAL HARANGUE OF THE PETITIONER AT HIS SENTENCING HEARING WHEN THE GOVERNMENT AGREED TO STAND MUTE AT SENTENCING AS TO THE LENGTH OF INCARCERATION PURSUANT TO A PRIOR PLEA AGREEMENT.

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IN THE

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No.

DONALD SCHMIDT,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Donald Schmidt, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals of the Fourth Circuit entered in this proceeding on October 6, 1981.

OPINION BELOW

The Court of Appeals for the Fourth Circuit filed an opinion on October 6, 1981. That opinion was unpublished and appears in the Appendix hereto. (App. A). Since the Petitioner entered a plea of guilty as to one count against him, no opinion was issued by the trial court.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on October 6, 1981. A petition for rehearing was denied by the Court of Appeals for the Fourth Circuit on November 16, 1981. (App. B). This petition for certiorari was timely filed within 60 days of that date pursuant to Rule 20. This Court's jurisdiction is invoked under Title 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

On July 29, 1980, the Petitioner, Donald Schmidt, was indicted for one count of conspiracy to transport stolen property in interstate commerce, as well as six counts of interstate transportation of stolen property. On October 20, 1980, the Petitioner entered a plea of guilty pursuant to a written plea agreement entered into with the Government as

to Count V of the indictment against him. (App. C). The plea agreement provided in pertinent part that:

> "1. The Defendant agrees to plead guilty to Count V of the indictment in the above-captioned matter, charging the violation of Title 18, of the United States Code, Section 2314, interstate transportation of stolen property. A maximum penalty for the offense charges a term of imprisonment of not more than 10 years and/or a fine of $10,000 or both.
>
> 2. In the turn for the Defendant's plea of guilty to Count V of the indictment, the Government agrees to recommend that the Court dismiss the remaining Counts of the indictment pending against Mr. Schmidt at the time of sentencing.
>
> 3. The Government agrees to recommend that the Defendant be sentenced to a period of incarceration, *however, the Government will take no position regarding the appropriate length of the period of incarceration to be imposed.* (Emphasis added).
>
> 4. The Defendant agrees when he appears before the Court for sentencing, the Government will be entitled to bring to the Court's attention and the Court will be entitled to consider all relevant information with respect to his background, character and conduct."

The trial judge accepted the Petitioner's plea of guilty and then ordered the preparation of a pre-sentence report. This report included a Sentencing Memorandum from the Petitioner's attorney. (App. D).

At the Petitioner's sentencing hearing on December 19, 1980, the Government vehemently responded to each of the assertions of fact contained in the Petitioner's Sentencing Memorandum contained in the pre-sentence report. (App. E). When the Government prosecutor was asked by the trial judge if he had any comments to make regarding the Petitioner's sentence, the prosecutor stated as follows:

"Yes, your Honor, I do. Your Honor, I begin by saying I read the pre-sentence report and in all candor I wasn't sure whether a probation officer had written it or Mr. Schmidt's lawyer. It paints a picture of a man who is extremely hard working, a good family man, works hard at his business, pulls himself up by his boot straps and through hard working and clean living does pretty well for himself but maybe he made a little bit of a mistake. The report which I would like to quote says that the Defendant has been active in his business enterprise in the area of golf and billiard equipment, he is a hard working individual who by all reports has been an excellent family man and provider. Although Mr. Schmidt has only a 10th grade education, he has been remarkably successful in his business enterprises."

"Your Honor, the picture painted by the pre-sentence report is a gross distortion of the facts. Mr. Schmidt is a *fence* and in fact he is a *liar*." (Emphasis supplied).

"Mr. Schmidt is an excellent provider but if he is so it is because he has been an *excellent thief up until now*." (Emphasis supplied).

"I would like to go down the Statement of Facts (prepared by Mr. Schmidt) and point out the *inaccuracies and the lies* one by one and fill in what was left out." (Emphasis supplied).

"In summary, Your Honor, what you have as a Statement of Facts is full of *inaccuracies, distortions and outright lies*. (Emphasis supplied). Your Honor, the Statement of Facts that you had presented to you was the defense of the Defendant that he *chose not to try to sell to a jury because he had to know that no jury in their right mind would ever believe it*. (Emphasis supplied). Your Honor, I submit that this is offensive, it offends common sense to think that what is presented is the truth. What it is, is a classic case of admitting what you absolutely have to and try to explain away the rest. *Building a story of utter lies* and a skeleton of damaging truth. (Emphasis

supplied). And just as prejury is held against the Defendant, perjury when it comes from the stand is held against the defendant at the time of sentencing. So should statements such as this which are *utter lies*. (Emphasis supplied). It is just a desperate attempt to avoid going to jail. Your Honor, I won't comment on the letters which have been submitted except to note where they come from, most of the families and friends including I guess one friend who wanted to let the court know that as a boy, Mr. Schmidt was interested in dogs and chickens. I frankly do not see the relevance of that at the time of sentencing or mostly what else is contained in those letters. The Government's view is that the fence facilitates the crime, that is especially true in this case. . . ."

"Now, much as been made of the fact that Mr. Schmidt has no record, Your Honor, *I think that description is laughable*. (Emphasis supplied). All that can be said is that Mr. Schmidt has never been caught before, that is a lot different than somebody who is a first offender and commits an impulsive crime and is caught for it. This is a scheme that has been going on as the Government would contend since the early 70's. This is the man who has taken great pains to cover his tracks with phoney invoices and dealing at arms length with the burglars to minimize face to face contact. He has been quite successful up to now, but that doesn't make him a first offender."

"Finally, Your Honor, considering the facts of this case, the degree of Mr. Schmidt's culpability and also considering what I consider lies to the Court in his Statement of Facts, I believe that probation is completely out of the question and the Government would recommend that Mr. Schmidt be incarcerated."

Thereafter, the Petitioner was sentenced to a period of three years incarceration.

Subsequently, on December 31, 1980, the Government

dismissed the remaining charges against the Petitioner. On the same date, the Petitioner filed a motion to withdraw his plea and a motion for new trial, both of which were denied by the trial court. Thereafter, the Petitioner perfected an appeal to the Fourth Circuit Court of Appeal, alleging that the Government, by its verbal harangue of the Petitioner at sentencing, violated the spirit and substance of the written plea agreement and consequently violated the Petitioner's constitutional right to due process of law. On appeal, the Petitioner specifically requested that he not be permitted to withdraw his plea. To the contrary, the Petitioner requested that the Fourth Circuit Court of Appeals vacate the judgment of the trial court and remand the case with instructions that the Petitioner be allowed to enter a plea of guilty to Count V as per the original plea agreement of October 20, 1980. Notwithstanding, the Fourth Circuit Court of Appeals concluded that the Government complied fully and fairly with the terms of the plea bargain agreement and thus affirmed the judgment of the trial court.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The Petitioner argues the following reasons why this petition for writ of certiorari should be granted:

1. The decision below conflicts with decisions of this Honorable Court as well as other federal courts on a similar federal question.

2. The decision below raises the important question regarding the proper role of a government prosecutor at a defendant's sentencing hearing when a plea agreement exists.

I.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS HONORABLE COURT AS WELL AS OTHER FEDERAL COURTS ON A SIMILAR FEDERAL QUESTION.

In deciding the case at bar, the Fourth Circuit Court of Appeals expressly found that, notwithstanding the prosecutor's derogatory remarks regarding the Petitioner, the prosecutor nonetheless "met its obligation to fulfill with fairness the terms of the plea bargain agreement." However, the Petitioner submits that the decision below necessarily conflicts with cases previously decided by this Honorable Court and the well-settled principles established therein.

In *Machibroda v. United States*, 368 U.S. 487, 82 S.Ct. 510 (1962), this Honorable Court, speaking through Justice Stewart, held that a guilty plea, if induced by *promises* or threats which deprive it of the character of a voluntary act, is void. In *Machibroda*, this Court decided that the petitioner should have been granted a hearing on his motion to vacate his sentences under 28 U.S.C., Section 2255, since the petitioner alleged in his motion that his guilty pleas had not been voluntary but rather had been induced by promises by the prosecutor as to the length of the sentences that would be imposed against him.

Moreover, more recently in the case of *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495 (1971), this Honorable Court expressly stated that "... When a (guilty) plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S. at

264. Further, this Court held that the fact that the Government's breach of a plea bargain agreement was inadvertent does not lessen its impact.

Similarly, in the case at bar the Petitioner submits that his guilty plea was based in strong measure on the prosecutor's promise contained in the plea agreement to make no recommendation as to the length of incarceration. However, subsequent to the prosecutor's diatribe against the Petitioner, the prosecutor's "promise" as to the length of incarceration necessarily became a mere nullity. Thus, the Government's promise was completely unfulfillable and consequently violated the mandate set forth in *Santobello, supra.* Furthermore, the Petitioner claims that it was completely impossible for the trial court to not have been influenced by the prosecutor's tirade at the sentencing hearing.

Notwithstanding the above-argued conflict between the decision below and the above decisions of this Honorable Court and the principles contained therein, the Petitioner contends that the decision below also conflicts with numerous decisions of the Fourth Circuit Court of Appeals itself as well as decisions of other Circuit Court of Appeals.

The case of *Harris v. Superintendent, Va. State Penitentiay,* 518 F.2nd 1173 (4th Cir. 1975), is extremely analogous to the case at bar. In *Harris,* the prosecutor promised to recommend to the Court a 24-year sentence. Instead, the prosecutor stated to the Court as follows:

> "I would say to the Court that each of these cases stands by itself and extremely dangerous cases. If put together, realizing one man has committed all of these crimes in a short period of time, showing literally no remorse, considering armed robbery as a way of life, more or less a habit in his own words makes him a most dangerous type of criminal in our society. And *the punishment for these armed robberies must be extremely severe,* not to

> rehabilitate this man. I don't think that there is one inkling that this man can be rehabilitated, but to protect society from this type contact."

Although the prosecutor in *Harris* did not specifically recommend any length of sentence, but merely stated that the petitioner's punishment should be "extremely severe", the Fourth Circuit Court of Appeal nonetheless held that the prosecutor had breached his promise with respect to the sentence recommendation and consequently vacated the petitioner's 53-year sentence and remanded the case back to the District Court. The Court cited this Honorable Court's case of *Santobello, supra*, in support of its decision.

Furthermore, in a case converse to the one at bar but nevertheless extremely analogous, the Fourth Circuit Court of Appeals in *United States v. Brown*, 500 F.2nd 375 (4th Cir. 1974), held that the prosecution's action in only "half-heartedly" recommending a sentence (as opposed to expressing "some degree of advocacy" with respect to the sentence) which it had agreed to recommend in exchange for the defendant's plea constituted a failure to live up to the plea bargain agreement and consequently entitled the defendant to be resentenced by a different judge.

In the case at bar, the Government essentially provided the Petitioner with an unfulfillable promise. It did so through its constant reminder at the sentencing hearing of the other indictments against the Petitioner, its constant reference to the pre-sentence report as something prepared by the Petitioner's attorney rather than an objective presentation of the facts and such other verbal abuses which made it impossible for the Government to have stood mute as to the length of sentence as required by the written plea agreement. As stated in the case of *United State v. Hammerman*, 528 F.2d 326 (4th Cir. 1975):

> "It does not matter what the prediction or promise was made in good faith. What matters is that it was probably relied upon, was not fulfilled and was unfulfillable." *Id.* at 331.

In this regard, the Petitioner certainly relied upon the Government's promise to stand mute as to the length of incarceration. This reliance included the fact that the Government would not make a spectable of the Petitioner (as it did) nor would it bring in information as to the other charges which were to be dismissed pursuant to the plea agreement (which it did). Moreover, the Petitioner contends that it is mutually exclusive for the Government to be able to stand mute with respect to the length of incarceration, but yet so vehemently argue that the Petitioner was the most culpable figure in the crime, was a "liar", was an "excellent thief", distorted his facts, was not a first offender, and lived his entire life through "lies", "phony invoices" and the crimes he was charged with committing.

Furthermore, in the case of *Scott v. United States*, 419 F.2d 264 (D.C. Cir. 1969), the District of Columbia Circuit Court of Appeals, speaking through Chief Judge Bazelon, held that if a defendant decides to admit his guilt because of a commitment from the prosecutor, it is essential for the validity of his plea that he have a full and intelligent understanding of the nature and extent of that commitment. *Id.* at 274. In the instant case, the Petitioner submits that he did not have a full and intelligent understanding of the nature and extent of the Government's commitment with respect to the plea agreement in light of the fact that, as referred to in footnote 1 of the decision of the Fourth Circuit Court of Appeals, the original proposed plea agreement would have required the prosecution to remain silent during the entire sentencing proceedings. Furthermore, the subsequent plea agreement which is an issue in this case stated that the

Government would not take a position regarding the appropriate length of the Petitioner's period of incarceration.

In the case of *United States v. Paiva*, 294 F.2d 742 (D.C. Cir. 1969), the Circuit Court of Appeals held as follows:

> "If after having utilized its discretion to strike bargains with potential defendants the government seeks to avoid those arrangements by using the Courts, its decision to do so will come under scrutiny. If it further appears that the defendant, to his prejudice performed his part of the agreement while the government did not, the indictment may be dismissed."

In the case at bar, the Petitioner quite clearly performed his part of the plea bargain he plead guilty to one of the charges against him. However, the Government on the other hand clearly violated its part of the plea bargain agreement by the never-ending and bitter remarks made by the prosecutor throughout the Petitioner's sentencing hearing. Consequently, the Petitioner submits that the Government's failure to comply with its part of the plea agreement constituted a violation of the Petitioner's constitutional right to due process of law as guaranteed him by the Fifth Amendment.

Thus, where, as here, the decision below conflicts with decisions of this Honorable Court as well as other federal decisions, a writ of certiorari should issue so that the conflict may be immediately resolved.

II.

THE DECISION BELOW RAISES THE IMPORTANT QUESTION REGARDING THE PROPER ROLE OF A GOVERNMENT PROSECUTOR AT A DEFENDANT'S SENTENCING HEARING WHEN A PLEA AGREEMENT EXISTS.

In light of the prosecutor's remarks at Petitioner's sentencing hearing and the decision below which essentially condones such "sardonic" remarks, the Petitioner claims that a decision is desperately needed from this Honorable Court to set forth certain definite standards or responsibilities which prosecutors should be required to adhere to when they choose to engage in the process of plea bargaining. As yet, there exists no such set of responsibilities or standards. Certainly, Rule 11 of the Federal Rules of Criminal Procedure does not set forth any duties or responsibilities of the *prosecutor* in the criminal justice system with respect to pleas. Nor does case law provide any sufficient uniform standards. Consequently, the Petitioner submits that such responsibilities are absolutely necessary to insure that pleas entered by persons accused of crimes are entered freely and voluntarily with full knowledge of the consequences of their pleas.

Thus, the Petitioner respectfully asks this Honorable Court to decide this important question, which undoubtedly would have far-reaching effects as to the conduct of government prosecutors throughout the country, all of whom must engage in the important and necessary practice of plea bargaining.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD M. KAY,
ESQUIRE

D. ROBERT SILBER,
ESQUIRE

DOUGLAS J. GLAID,
ESQUIRE

KAY AND SILBER, P.A.
510 S.E. Seventeenth Street
Ft. Lauderdale, Florida 33316
Telephone: (305) 764-0033
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the United States Attorney's Office, 101 West Lombard Street, Baltimore, Maryland, 21201, this 14th day of January, 1982.

EDWARD M. KAY,
ESQUIRE

D. ROBERT SILBER,
ESQUIRE

DOUGLAS J. GLAID,
ESQUIRE

KAY AND SILBER, P.A.
510 S.E. Seventeenth Street
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Telephone: (305) 764-0033
Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-5034

UNITED STATES OF AMERICA,

Appellee,

v.

DONALD SCHMIDT,

Appellant.

Before: RUSSELL, WIDENER and HALL, Circuit Judges.

Robert C. Stone (Stone, Dell & Schaefer on brief) for Appellant; D. Christopher Ohly, Assistant United States Attorney (Herbert Better, United States Attorney, Richard E. Dunne, III, Assistant United States Attorney, on brief) for Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph C. Howard, District Judge.

Argued August 7, 1981 Decided October 6, 1981

PER CURIAM:

On October 20, 1980 Donald Schmidt pleaded guilty to one count of a seven count indictment which charged him with interstate transportation of stolen property, a violation of 18 U.S.C. §2314 (1976). On December 19, 1980 the district court sentenced Schmidt to three years in prison. Schmidt in this appeal does not ask that his conviction be set aside but that we remand the case and order a new sentencing before a different judge on the grounds that during the sentencing hearing the Assistant U.S. Attorney violated certain terms of the plea bargain and that his remarks were otherwise not called for. We affirm.

Schmidt was indicted after an F.B.I. investigation linked his Florida golf and sporting goods business to a series of robberies of golf shops in Maryland and other states. The government alleged that Schmidt served as a fence for the stolen equipment. Evidence against Schmidt included documents and physical evidence as well as tape recordings gathered through the use of a plant which indicated Schmidt's awareness that the goods were, in fact, stolen.

On July 29, 1980 a seven count indictment was returned against Schmidt and five co-defendants. The indictment charged Schmidt with a single count of conspiracy to transport stolen property in interstate commerce in violation of 18 U.S.C. §371, and six counts of interstate transportation of stolen property in violation of 18 U.S.C. §2314. Schmidt and his attorney eventually agreed to a plea bargain with the U.S. Attorney's office. In exchange for Schmidt's guilty plea to one of the interstate transportation counts, the U.S. Attorney's office agreed to recommend that the trial court dismiss the balance of the indictment pending against Schmidt. The agreement also provided:

> "3. The government agrees to recommend that the defendant be sentenced to a period of incarceration.

However, the government will take no position regarding the appropriate length of period of incarceration to be imposed.

4. The defendant agrees, when he appears before the Court for sentencing, the government will be entitled to bring to the Court's attention, and the Court will be entitled to consider, all relevant information with respect to his background, character and conduct."[1]

On October 20, Schmidt entered his guilty plea in accordance with the agreement. The trial judge accepted the plea and then granted a continuance to allow preparation of a presentence report. This report included a memorandum from the appellant which strenuously argued for the awarding of probation rather than incarceration, as was its due. But the memorandum contained a statement of facts of the case which differed markedly from a statement of facts provided by the Assistant U.S. Attorney at the time the guilty plea was given and which had not been objected to.[2]

At the sentencing hearing, the Assistant U.S. Attorney strongly objected to the memorandum. He told the court, "[T]he picture painted by the presentence report is a gross distortion of the facts. Mr. Schmidt is a fence, and in fact, he is a liar." The prosecuting attorney then proceeded to refute the factual allegations of the memorandum, to which the defense attorney objected. Schmidt now asserts that these comments violated the spirit and substance of the plea agreement which

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[1]The U.S. Attorney's office originally proposed a plea agreement which would have required the prosecution to remain silent during the sentencing proceedings. When the defendant failed to accept this proposal within the allotted time, it was withdrawn.

[2]During the arraignment proceedings, the Assistant U.S. Attorney offered a summary of the evidence gathered against Schmidt. The defense made no specific objections to this statement but did reserve the right to make comments as part of a sentencing memorandum.

provided that the government not take a position as to the appropriate length of the sentence.

That constitutional considerations of fairness require that the prosecution uphold its end of a plea bargain is well established. See *Santobello v. New York*, 404 U.S. 257, 261-63 (1971); *Cooper v. United States*, 594 F.2d 12, 15-16, (4th Cir. 1979); *United States v. Brown*, 500 F.2d 375, 377 (4th Cir. 1974). This court has held that the fairness requirements go beyond a simple adherence to traditional contract principles. *Cooper* at 16-17. We have stated that the decision depends upon an objective test—"whether the plea agreement has been breached or not . . ." *United States v. Brown*, 500 F.2d 375, 378 (4th Cir. 1974).

We find that the prosecution has met its obligation to fulfill with fairness the terms of the plea bargain agreement. The Assistant U.S. Attorney, for example, specifically declined to answer any inquiry from the trial judge as to what length of incarceration would be appropriate, which is in accord with item #3 of the plea bargain agreement. Furthermore, in the agreement the prosecution reserved the right to bring to the trial court's attention during sentencing relevant information on the defendant's backgorund, character and conduct.

It appears from the record that while the Assistant U.S. Attorney's comments may have carried a sardonic tone, they were addressed to factual assertions in the sentencing report which contradicted statements of fact made by the prosecution at the time the guilty plea was taken, which were specifically not objected to. The remarks do not appear to be part of an attempt by the prosecution to unfairly introduce additional evidence related to the appellant's conduct or a harangue of any kind. It should be noted that sentencing hearings are vastly different from a trial with fewer limitations on the information which a sentencing judge may

receive on the background, character or conduct of a convicted person. See 18 U.S.C. §3577. Finally, we note that in response to a comment by the defense attorney, the trial judge stated that "rhetoric alone" of the U.S. Attorney would not influence the court's decision. While this statement may not be conclusive as to whether the prosecution's comments had any unfair impact on the court, it at the least shows that the court was aware of the defense attorney's concerns regarding the prosecution's comments.

We thus conclude that the U.S. Attorney's office complied fully and fairly with the terms of the plea bargain agreement.

The judgment of the district court is

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-5034

UNITED STATES OF AMERICA,

Appellee,

v.

DONALD SCHMIDT,

Appellant.

ORDER

We have considered the petition for rehearing filed by the appellant in this case October 26, 1981, and his petition for stay of mandate filed the same date.

The petition for rehearing should have been filed October 20, 1981, and the petition for rehearing and request for stay of mandate were obviously mailed or delivered to the United States Attorney on or before October 19, 1981, for the certificate of service of the United States to its response is dated that date. Accordingly, we consider that the petition for rehearing was timely filed.

We are of opinion, however, that the petition for rehearing is not well taken and are of the same opinion with respect to the petition for stay of mandate.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing and the petition for stay of mandate shall be, and they hereby are, denied.

With the concurrence of Judge Russell and Judge Hall.

For the Court

APPENDIX C

EXHIBIT B

UNTIED STATES ATTORNEY
DISTRICT OF MARYLAND
United States Courthouse, Eighth Floor
101 West Lombard Street
Baltimore, Maryland 21201

RBS:vvb/80-1685

OCTOBER 20, 1980

Robert C. Stone, Esquire
STONE, SHAPIRO & DELL, P.A.
Fourth Floor, Center Court Bldg.
2450 Hollywood Boulevard
Hollywood, Florida 33020

Re: *United States v. Donald Schmidt*
Criminal No. JH-80-0274

Dear Mr. Stone:

This letter contains the agreement into which the United States of America is willing to enter with your client with respect to charges of interstate transportation of stolen property presently pending against him in this District.

1. The defendant agrees to plead guilty to Count Five of the Indictment in the above-captioned matter, charging a violation of Title 18, United States Code, Section 2314, interstate

transportation of stolen property. The maximum penalty for the offense charged is a term of imprisonment of not more than ten years and/or a fine of $10,000, or both.

2. In return for the defendant's plea of guilty to Count Five of the Indictment, the government agrees to recommend that the court dismiss the remaining counts of the Indictment pending against Mr. Schmidt at the time of sentencing.

3. The government agrees to recommend that the defendant be sentenced to a period of incarceration. However, the government will take no position regarding the appropriate length of the period of incarceration to be imposed.

4. The defendant agrees, when he appears before the Court for sentencing, the government will be entitled to bring to the Court's attention, and the Court will be entitled to consider, all relevant information with respect to his background, character and conduct.

This letter states the complete agreement into which the government is willing to enter with Mr. Schmidt in this case. No other promises or predictions have been made to you or to the defendant in connection with this case.

Furthermore, the defendant understands that the Court is not a party to nor bound by this agreement and can sentence the defendant to a period of incarceration of ten years and/or a fine of $10,000, or both.

If you and Mr. Schmidt accept fully each and every one of the terms and conditions of this agreement, please execute and have Mr. Schmidt execute the original copy of this letter

and return that copy to me. Additional copies of this agreement have been enclosed herewith for your files and for Mr. Schmidt.

Very truly yours,

Russell T. Baker, Jr.
United States Attorney

BY: _____
Robert B. Schulman
Assistant U.S. Attorney

I have read this agreement and have carefully reviewed every part of it with my attorney. I understand it, and I voluntarily agree to it.

_____ DATE: _____
DONALD SCHMIDT, Defendant

I represent Mr. Schmidt as legal counsel. I have carefully reviewed every part of this agreement with him. To my knowledge, his decision to enter this agreement is an informed and voluntary one.

_____ DATE: _____
Robert C. Stone, Esquire
Attorney for Defendant Schmidt

APPENDIX D

EXHIBIT D

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Case No. 80-4134
	)	
DONALD SCHMIDT,	)	
	)	

SENTENCING MEMORANDUM

COMES NOW the Defendant, DONALD SCHMIDT, and files this sentencing memorandum on his own behalf and would show the Court as follows:

1. The Defendant agreed to plead guilty to Count V of the indictment charging him with title 18 of the United States Code, Section 2314, Interstate Transportation of Stolen Property. In return for his plea the Government agreed to dismiss the remaining counts. They agreed that they would take no position regarding the length of incarceration that the Court might impose but would recommend incarceration. Originally the Government also agreed to stand mute at

sentencing. The Government reserved the right to bring in all information regarding the Defendant's background, character and conduct to the Court's attention at sentencing.

2. The late Judge Herlands in an article appearing in 35 F.R.P. page 487, 494, (1964), When and How Should a Sentencing Judge Use Probation:

> In making a sound evaluation and decision, the sentencing Judge must (1) analyze the personality of the defendant, his problems, needs and concerns; (2) reach a conclusion as to the future adjustment of the defendant (will prison help him or harm him? Is he a good risk for rehabilitation?); and (3) determine whether the defendant, if not imprisoned poses a distinct threat to the safety of the community.

following factors be given weight in favor of withholding a sentence of imprisonment:

(1) The defendant's criminal conduct neither caused nor threatened serious harm;

(2) The defendant did not contemplate that his criminal conduct would cause or threaten serious harm;

(3) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime;

(4) The imprisonment of the defendant would entail excessive hardship to himself or to his dependents.

The Defendant, DONALD SCHMIDT, meets all criteria. It is interesting to note that in 1977 the Congressional Budget Office estimated that it cost $17,000.00 to maintain a Federal prisoner for one year, while constructing one prison bed is now about $43,000.00 in the federal system. Other, less easily quantified public costs also result from incarceration, including the lost productivity of the inmate's forfeited employment and the possible need to maintain the inmate's family on public welfare. Quite obviously the cost is even

greater now. See Reform of the Federal Criminal Laws; Hearings on S. 1437 before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 95 Cong. 1st Sess. 9123, 9130, (1977) (statement of M. Kay Harris, Coordinator, National Moratorium on Prison Construction).

3. The Defendant maintains that his conduct in this matter indicated poor judgment, for which he should be punished, but that he should not be required to be incarcerated. Attached hereto and made a part hereof is an eight page statement in the Defendant's own words as to the fact of exactly what he did.

4. The Defendant's position is that he met Sonny Bishop in the fall of 1979. Mr. Bishop advised him that he could sell him golf gloves for $200.00. The Defendant owns a retail store in Hollywood, Florida and he has a retail store and warehouse in Miami, Florida. It is a common practice for him to buy merchandise from individuals at wholesale prices.

Mr. Bishop signed a receipt and the gloves were received. He was contacted again in February of 1980 and purchased merchandise which had a wholesale worth of $9,500.00 for $6,429.50. On March 8, 1980 Mr. Bishop contacted the Defendant and sold him golf equipment for $4,850.00 and was worth $6,300.00 wholesale. It was not until March 9, 1980 when Mr. Bishop asked the Defendant to pick up his girlfriend that he thought something was wrong. When he went to pick her up she told him that Mr. Bishop was robbing a place in Palm Beach, Florida. The Defendant was shocked when he learned that he was buying stolen property. He confronted Mr. Bishop who told him that he would kill him and his family if he contacted the police. He discussed this with his father and was advised to go to the police. But he was concerned for his own safety and for the safety of his family.

Also Mr. Bishop had told him that he would be involved himself.

Mr. Bishop contacted him some four or five weeks later. Don told him that the F.B.I. had been in to see his employees (which was not true) and that he didn't want to do business with him. He wanted to try and dissuade him from any further business but Mr. Bishop insisted. The Defendant purchased $1,440.00 worth of merchandise from Mr. Bishop which the F.B.I. had purchased for Mr. Bishop.

5. The Government indicated that Mr. Schmidt was a fence and would take all stolen golf equipment that Mr. Bishop could steal. The Defendant maintains this is not true and that he had no idea that golf shops had been robbed until he read the indictment. The Defendant is willing to take a lie detector test on this issue.

6. The Defendant is married and has three children. He has never been arrested and has had no trouble with the police. He is a responsible businessman and attached are some fifteen letters from individuals that know him and do business with him. Also a very personal letter from his parents.

7. The Defendant respectfully requests that this Court impose a period of probation upon him. The Defendant maintains that a prison sentence is not warranted as he is not a danger to the community but holds a respectable position in the community and is a respectable businessman. There would be no justice in sending the Defendant to jail as he has punished himself. Since this began the Defendant has not had a full night's sleep and his health is deteriorating. His wife has ulcers and hypertension. A prison sentence would destroy his marriage, his business and his life.

8. Attached hereto and made a part hereof are receipts given to the Defendant by Mr. Bishop showing the very businesslike manner in which he conducted himself.

The interest of justice requires that the Defendant be punished, however, probation is a desirable disposition in this case as it will rehabilitate Mr. Schmidt and will avoid the negative effects of confinement as well as minimize the impact of his conviction upon innocent members of his family.

It is respectfully submitted that a "non custodial sentence" will not only benefit Mr. Schmidt and his family but also the Government.

Attached hereto and made a part hereof is an excellent article from Judge Morris E. Lasker, Judge, United States District Court for the Southern District of New York, B.A. 1938, Harvard College J.D., 1941, Yale Law School.

APPENDIX E

EXHIBIT E

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

United States of America	)	
	)	
vs.	)	JH-80-0274 Criminal
	)	
Donald Schmidt	)	

Baltimore, Maryland
December 19, 1980
December 31, 1980

The above-entitled case came on for sentencing before His Honor, Joseph C. Howard, at 4 p.m.

APPEARANCES

For the Government:

Richard Dunne

For the Defendant:

Robert Stone
Gary Mandel

Reported by:

Julie T. West

(The following proceedings were had in open court:)

THE COURT: Will the Government call the case?

MR. DUNNE: Your Honor, the Government would call for sentencing in the case of the United States v. Donald Schmidt, Criminal Number JH-80-0274.

THE COURT: Do you have any comments to make, Mr. Dunne?

MR. DUNNE: Yes, Your Honor, I do.

Your Honor, I begin by saying, I read the presentence report, and in all candor, I wasn't sure whether a probation officer had written it or Mr. Schmidt's lawyer. It paints a picture of a man who's extremely hard working, good family man, works hard at his business, pulls himself up by his boot straps, and through hard work and clean living, does pretty well for himself, but maybe he made a little bit of a mistake.

The report, which I'd like to quote, says, the defendant has been active in building his business enterprises in the area of golf and billard equipment. He is a hardworking individual, who by all reports, has been an excellent family man and provider. Although Mr. Schmidt has only a tenth grade education, he has been remarkably successful in his business enterprises.

Your Honor, the picture painted by the presentence report is a gross distortion of the facts. Mr. Schmidt is a fence, and in fact, he is a liar. The presentence report is flawed by a complete failure to look beyond Mr. Schmidt's preposterous story which he has concocted to explain away his criminal activity; and in fact, it makes the silly mistake about his net worth, taken from the own documents submitted by Mr. Schmidt.

Mr. Schmidt is an excellent provider, but if he is so, it is because he has been an excellent thief up until now. Insofar as his being a great family man goes, had this case gone to trial,

the Government would have shown that Mr. Schmidt involved his family in his criminal activities, his wife, his brother, both his sons, and possibly his father. Just like Sonny Bishop did.

Now, Your Honor, it has come to my attention that Mr. Mandel has spoken to your law clerk, and either directly or indirectly, indicated that had you granted the motion for change of venue, that this case would have either been dismissed or handled in an entirely different manner by the United States Attorney's Office in Florida. I suppose that is an attempt to impress upon the Court that this is not a serious matter, at least in the eyes of the people in Florida.

THE COURT: For the record, if the allegations are correct, my law clerk has transmitted absolutely nothing to me.

MR. DUNNE: Very well, Your Honor, then I won't say any more except to say, whatever statement was made was incorrect.

Your Honor, I have carefully reviewed the sentencing memorandum prepared by Mr. Schmidt's lawyer and, in particular, the Statement of Facts, which I understand Mr. Schmidt prepared himself and typed himself, and I would say that it certainly makes my job an awfully lot easier here today. I would like to go down the statement of facts and point out the inaccuracies and the lies, one by one, and fill in what was left out.

First, first paragraph, Mr. Schmidt states that he first met Sonny Bishop in the Fall of 1979, when Sonny Bishop called his store, spoke to Mr. Schmidt, and offered to sell him $200 worth of golf gloves. Mr. Schmidt said that he accepted the offer, immediately mailed a check to Sonny Bishop, and about a week later, got the gloves. Your Honor, that is not consistent with the facts, and, in fact, it is not even consistent with what Mr. Schmidt first told the F.B.I.

He was interviewed on May 15th, by the F.B.I., at which time he said he first met Sonny Bishop in December of '79. He said that Sonny came into his store.

Second of all, Your Honor, I submit that it is utterly preposterous to suppose that a man would send $200 to a complete stranger on the basis of a single phone call, which is what Mr. Schmidt would have this Court believe.

Number two, Mr. Schmidt says that the second purchase of golf equipment by himself from Sonny Bishop occurred around Thanksgiving, and that the wholesale value was around fifty-one hundred dollars, for which he paid thirty-eight hundred dollars. Your Honor, in reality, the wholesale value was ten thousand dollars. That was taken from the Maple Hurst Country Club.

Number three, Mr. Schmidt indicates that the third buy occurred around the 4th of January, 1980, that the wholesale value was ten thousand dollars — ten thousand two hundred dollars, for which he paid seventy-four hundred dollars. Your Honor, in reality, it was a wholesale value of thirty thousand dollars, taken from Fort Meade.

MR. STONE: Your Honor, if it please the Court, I would object to this. I think this is very unfair for the Government to use this form to, in essence, debate the facts, if the Court please, of this particular case. This man has pled guilty to this particular offense, and has admitted his guilt to the Court. I think it is very unfair for the Government, in essence, to turn this forum into a trial. We have no opportunity to cross-examine the individuals, who are reflected in the statement that the prosecutor is making. The statements that he has made, are his own assertions. There is no witness to testify to that. If we had wanted to do this, and go through this procedure, we could have had a trial, and that is the proper forum, but this is a sentencing, Your Honor. I would most strenuously object.

THE COURT: Overruled.

MR. DUNNE: Your Honor, Mr. Schmidt also indicates that, at the time he was dealing with Mr. Bishop, at this instance, Mr. Bishop offered him three rifles, and he didn't want any part of it. Your Honor, he also indicated that he thought that Bishop had told him he had gotten the rifles from an auction. The rifles were military weapons. One was an M-16. You don't buy weapons like that at auction, and you don't have to be a gun nut to know that.

The fourth buy, February 20, 1980, Mr. Schmidt indicates that the total wholesale value was ninety-five hundred dollars, and he paid sixty-four hundred dollars.

THE COURT: You are alluding to his statement, are you not?

MR. DUNNE: This is his statement, in the Statement of Facts, and that he has indicated that no clothes were bought. I guess that was so that, if there was a discrepancy between the amount of money that was stolen and how much he claims that was delivered, that was clothes, which he refused to buy.

Your Honor, in reality, the amount stolen was twenty-nine thousand dollars from the Chartwell Country Club. Of that amount, one hundred dollars represented apparel, and there are indications on the tapes, and there are also indications from other witnesses in this case, that the only clothes, and the only equipment of any kind that Mr. Schmidt refused to take were those that have identifying labels on them, for instance, the Country Club on the lapel of the shirt, on the hat, or sometimes, on golf clubs that had the name of the pro.

Your Honor, the fifth buy, Mr. Schmidt indicates in his statement of facts, that it was March 7, 1980, wholesale value, sixty-three hundred dollars; he paid forty-eight. In reality, twenty-five thousand dollars stolen, Beaver Creek Country Club. All of it, or most of all of it, sold to Mr. Schmidt by Sonny Bishop.

Your Honor, the Palm Beach Exxon Station, this is where Mr. Schmidt says in his statement of facts, where he first learned that Sonny Bishop was a burglar. He says he got a call from Sonny Bishop saying he wrecked his truck, would he help him out; would he go over and pick up his girl friend, Donna Sue Lemaster, at the motel, and bring her back. He says he did that. When he told Donna Sue Lemaster that the truck had been wrecked, she blurted out something to the effect, oh, he had been on a job. Your Honor, that's somewhat accurate, except it is just the reverse. It was Mr. Schmidt who told Donna Sue Lemaster that there had been a job, that he had gotten run on the job (sic), and that she was to come with him. At the same time, Mr. Schmidt was with him in the car, she was involved, she knew all about it.

Then Mr. Schmidt says that when he got back, Sonny Bishop threatened him, says, you tell the police, you're in a lot of trouble, I'm going to get your family. Your Honor, that's just not true. That's not the way it happened. Sonny Bishop, as you saw testify, is not a violent man. He's got a long record, but I don't believe there are any serious crimes involving violence. He doesn't carry a gun; he's just not that type, but if you have any doubt about that, read the tape, the tape transcript. When Mr. Schmidt and Mr. Bishop, at great length traveled all over Florida, looking for a place to deliver the last load of stolen goods, does that sound like a man in fear for his life, a man who's in fear for the lives of his family members. No, Your Honor. I submit it is two thieves talking about what they have done in the past, and how they are going to arrange this final transaction without getting caught.

And, then the control buy, Your Honor, I submit that Mr. Schmidt's explanation for his conduct on that day is utterly preposterous. He says that he was traveling all over, from one location to the next, in the hope that Sonny would get

lost, would just get discouraged. Your Honor, the reason was, he was afraid of being followed.

Sonny Bishop, during the Palm Beach Exxon Job, had crashed his truck. In the truck was the document, that some way related to Mr. Schmidt. I think it was — he was put down as a reference on an application for a purchase of a trailer. Donald Schmidt knew this, and was afraid that the police were going to come around and question him. That's what he was afraid of, it wasn't Sonny Bishop, he was afraid of getting caught.

And then the search, Your Honor, if Mr. Schmidt was so afraid of Sonny Bishop, why didn't he say so to the F.B.I. when they came to search his house. Okay, maybe he was scared. Why didn't he say something later on in the investigation. Your Honor, the reason was because it was a fabrication cooked up at the last minute, to try to explain away what he saw on the tapes for the first time. What he did say, and what he didn't include in his statement of facts, what he did say, at the time of the search, is why don't you guys go after somebody really big. Does that sound like a man who was afraid of Sonny Bishop? It sounds like a thief.

There are a few things he has left out. For example, the Susquehanna Valley Country Club, on 9/1/77. That was robbed to the tune of ninety-six hundred dollars. All that went to Donald Schmidt. Crofton Country Club, 12/1/77, twenty-seven thousand dollars, all to Donald Schmidt.

MR. STONE: Your Honor, most respectfully, may we show a continuing objection to these statements, so that I don't have to continue standing up because my client seriously disputes that, Your Honor.

THE COURT: I understand your position. You can have your continuing objection.

MR. STONE: Thank you, very much.

MR. DUNNE: Cocoa Beach Country Beach, there's nothing in that report, Your Honor, there's nothing in Donald Schmidt's statement of facts because I don't believe he knew we knew about it. This is the one where Sonny delivered a load of equipment taken from Florida. That was against the rules. Donald Schmidt didn't want anything from Florida because it was too hot. This was the instance where Sonny Boy, one of the only other people to meet Donald Schmidt, helped unload the equipment in Donald Schmidt's warehouse, where again, they traveled from place to place, taking round about routes, and a policeman pulled in behind Donald Schmidt, and he got very scared.

Your Honor, the relationship between Schmidt and Bishop didn't begin as alleged in 1979, it began in 1971, when Rocky Torchio introduced Sonny Bishop to Donald Schmidt. Your Honor, there are admissions on the tape which are utterly damning. He says, I never had any heat that way, in referring to another manner of dealing with somebody who was selling him stolen goods. Send it on the bus, just send it on the bus.

Your Honor, there is another statement on the tapes, and I won't belabor it, but this is from Mr. Schmidt's own mouth, they can really nail me well. Your Honor, they, is the Federal Government or any other police authorities. That's not a man who is afraid of Sonny Bishop, that's a man who is afraid of getting caught.

In summary, Your Honor, what you have is a statement of facts that is full of inaccuracies, distortions and outright lies. Your Honor, the statement of facts that you had presented to you is the defense the defendant chose not to try to sell to a jury because he had to know that no jury in their right mind would ever believe it. Yet, he is asking this Court to believe it. Your Honor, I submit that that is offensive. It offends

common sense, to think that what has been presented is the truth. What it is, is a classic case of admitting what you absolutely have to, and try to explain away the rest. Building a story of utter lies on a skeleton of damaging truth. And, just as perjury is held against a defendant, perjury, when it comes from the stand is held against the defendant at the time of sentencing, so should statements such as this which are utter lies. It is just a desperate attempt to avoid going to jail. Your Honor, I won't comment on the letters which have been submitted, except to note where they come from, mostly the families and friends, including, I guess, one friend who wanted to let the Court know that as a boy, Mr. Schmidt was interested in dogs and chickens. I frankly don't see the relevance of that at the time of sentencing, or mostly what else is contained in those letters.

Your Honor, the Government's position on fences is clear, and I won't belabor it. The Government's view is, the fence facilitates the crime. That's especially true in this crime. Golf equipment is not something like money, or chainsaws or television sets, and radios, that has a ready criminal market. You have to have a fence. If you don't have a fence, you don't commit the crime. In my view, having a fence, and being a fence means that the crimes are committed, and were it not for the fence, I'm sure Sonny Bishop, who has absolutely no need of golf equipment wouldn't have committed all of these burglaries.

Now, much has been made of the fact that Mr. Schmidt has no record. In fact, I believe he has been referred to as a first offender. Your Honor, I think that description is laughable. All that can be said is that Mr. Schmidt has never been caught before. That is a lot different than somebody who is a first offender, and commits an impulsive crime, and gets caught for it. This is a scheme that has been going on, as

the Government would contend, since the early 1970's. This is the man who has taken great pains to cover his tracks with phoney invoices, and dealing at arm's length with the burglars to minimize face-to-face contact. He has been quite successful up to now, but that doesn't make him to be a first offender.

Finally, Your Honor, considering the facts of this case, the degree of Mr. Schmidt's culpability, and also considering, what I consider lies to the Court in his statement of facts, I believe that probation is completely out of the question, and the Government would recommend that Mr. Schmidt be incarcerated.

Thank you, Your Honor.

THE COURT: Do you have a period of time in mind, counsel?

MR. DUNNE: No, Your Honor, I do not. I will not make a recommendation as to length of time.

THE COURT: All right. Thank you, very much.

Mr. Stone.

MR. STONE: Your Honor, if it please the Court, I compliment my brother lawyer on his eloquence, and on his presentation, but I trust that his rhetoric does not influence you, and take your mind away from the facts. Everything that this man has said —

THE COURT: Let me just put your conscience at ease, and your problems to rest, the Court will not be influenced by rhetoric alone.

MR. STONE: I appreciate that, Your Honor, because sometimes I get somewhat carried away myself. I don't feel it is proper for me to pound the table. I don't think that should influence you. I think what should influence you is the fact, that the Government completely misrepresents, if it please the Court, the record of Charles Sonny Bishop. Basically, this comes down to a case, is the Court going to believe a man

who has got at least a three or four page rap sheet. Charles Sonny Bishop, beginning in 1954, investigation for larceny; 1957, investigation for carnal knowledge; 1959, suspicion, larceny; 1962, investigation, larceny; the next month, investigation, larceny; 1963 received five years in State prison; in 1968, interstate shipment of stolen goods. The prosecutor also indicated there was nothing of a violent nature in the man's background. His record continues: 1969, stolen property; 1970, burglary; 1972, concealed weapon, rogue, vagabond. This is the man that says my client, who is married, who has a family, who has worked hard for the past twenty-five years of his entire adult life, who has never been in any trouble before, but yet, the Government wants you to believe Sonny Bishop. Untaxed cigarettes, shoplifting; again in 1972, position of keys, again a deadly weapon. There is also, in 1974, an escape charge on that matter.

I would respectfully submit to you, Your Honor, that Mr. Schmidt is the classic case, as the Probation Office has described to you. I believe the exact quote was, that for monetary greed, he made a serious misjudgment; and I think that is exactly what the man has done. Yes, he has committed a criminal act. Yes, he must be punished, but he is not a criminal in a sense that crime is a way of life for him. The man has never been arrested before. He owns two retail sporting good stores in Hollywood, and he has a warehouse in Miami.

Judge, I would like to reserve the opportunity to say some additional remarks to you, but I would like to call on members of his family to say a few words on his behalf if I may, Your Honor?

THE COURT: You may.

MR. STONE: Your Honor, obviously, this is a very emotional time for the defendant's mother, and she has written something she would like to read to you, with the Court's permission.

THE COURT: I would be happy to accept it. Swear the witness, will you please.

ESTELLE SCHMIDT,

was called as a witness, for and on behalf of the Defendant, and having been first duly sworn, testified as follows:

THE CLERK: Speaking directly into the microphone, please state your full name, first, for the record.

THE WITNESS: My name is Estelle Schmidt. I am Donald Schmidt's mother. Your Honor, I am Donald Schmidt's mother, and I am pleading his case before he has come up to — to be sentenced.

He has always been a wonderful son, and an extremely hard worker. Since he was 13 years old, he helped his father after school, in the meat business, and he helped him in the catering business. We had them both at one time, and we worked day and night on it. We worked — almost worked around the clock many times; and he was an excellent student in school; and at the age of 19, he got married. He married a good, Catholic girl, and they had their first child at the age of 20, which gave him a lot of responsibility for a young fellow.

Now, they have three children, 14, 18 and 20 years old. The girl is now in school, attending high school. She is 14 years old. They have a good religious home, and he keeps his children on the straight and narrow, which is really a hard job nowadays.

The last few months have been like a nightmare to all of us, for we have never been in any kind of trouble like this before in our lives. My husband and I are married for 44 years, and never have we ever been in a courtroom before. We are an American family, and it is just an average family — pardon me for crying.

THE COURT: Yes, ma'am.

THE WITNESS: I'm sorry — we are just an average family, and we are trying to just make an average living. We moved down to Florida in 1965, and the kids were little, and they were just starting in the golf — we were just starting in the golf business and the pool table business, and Don had to go from condominium to condominium, it's almost like knocking on people's door — from door-to-door, to try to get — to sell pool tables, and golf equipment, because business was so slow at that time. We were unknown, and we were struggling to try to get a start. We even sold patio furniture to try to make ends meet. There were long and tiring days, and hard times. God was good to us — God was good to us to have our business pick up, little by little, through advertising, and through Don visiting the different condominiums. Many a time a door was slammed in his face, when people were very poor, and they couldn't even attempt to pay for their — the merchandise that they already had, they said. These were really hard times for us.

Don has always been a very big-hearted person to everyone. He never could turn anyone down. Whenever they needed anything, he was right there to help them. He helped any number of people that had even just moved down from Cincinnati. They were friends of ours, and he gave one fellow a temporary job; he lent another one even furniture from his own home. He came and got furniture from my home to help, just until they got on their own feet.

He was very fortunate — unfortunate to have gotten caught up with someone like — got caught up with one he thought was a salesman, and turned out to be someone like Mr. Bishop.

Life sometimes can really throw you an unexpected curve. That's definitely something we didn't expect.

Don's wife is a wonderful wife, and a mother, but she has

had a lot of sickness in the last three years. This case has been terribly hard on her. She needs constant care because she faints, has about three or four different diseases of different kinds, such as angina, and, uh, ulcers, and she passes out, and she had — she has gone to many doctors, and she's always had — she has to have someone with her all the time. She's under a doctor's care constantly, and has every kind of x-ray imaginable taken in the last two years. Don cannot get any kind of insurance for her. All the insurance companies have refused her a policy. Don had $6,000 last year for hospital bills. He deprives himself of many things, without expressing himself, for his family. He's an all-around good person, Your Honor.

Please, Your Honor, please consider probation for him. He really is needed by his family very badly. This is the first – and I know his last time, God willing, that he will ever be in any kind of trouble of any kind, which he has never been before. We are all very religious people, and pray that God hears our prayer, and enlightens you to give him probation. This is the saddest and most difficult letter I have ever written, but it is Don's life — it is Don's life we are considering —

THE COURT: Mr. Clerk, get Mrs. Schmidt a glass of water, please.

THE WITNESS: It is his life, and our lives because we have been so close a family. Don has terrific high-blood pressure problems himself, and I know he couldn't stand to be separated from his family for any length of time, which would be very, very hard on all of us.

Thanks, Your Honor, for letting me speak to you this way — through all my tears. I'm sorry, but we have been so close, Your Honor that there is nothing, nothing that we wouldn't do for one another — for something like this to come so unexpectedly — he's innocent. He really — he probably did

something wrong, but he certainly didn't do the things that were told before Your Honor. It was impossible.

THE COURT: Thank you, very much.

(Witness excused.)

MR. STONE: Your Honor, this is the defendant's wife, Mrs. Betty Schmidt.

ELIZABETH SCHMIDT,

was called as a witness, for and on behalf of the defendant, and having been first duly sworn, testified as follows:

THE CLERK: Would you first state your full name for the record?

THE WITNESS: Elizabeth Schmidt.

Your Honor, I just want to say a few words. I'm not used to a courtroom, none of us are.

I really can't believe what the Government said about Don because it just isn't so. He — he's always helping everybody. He — he's constantly helping me. I pass out constantly. The man never leaves me alone. He's either home with me, and works from home, or if he has to go to the office, he takes me there with him. I can't even drive a car by myself. He will not allow me to drive a car by myself. He — He just — I don't know what to tell you. Over the years, he's just been so good with the kids. He really is the main influence keeping the kids straight. We've got three. Two boys and a girl. Sherrie is sitting back there right now.

MR. STONE: Mrs. Schmidt, could you advise the Judge of your personal medical problems?

THE WITNESS: Yes. That is what I was going to say. I have several things that I have. Diabetes; I've got angina; I've got ulcers. I have been blacking out for the last three, four, five months, and he has gotten every test imaginable for me, and he spares no expense, but they can't find out what is wrong. Its — I don't know if it's just worry over him, or if it's

something that they just haven't found yet, or what; but I am constantly under medical supervision. I go to the doctor about every six to eight weeks, which as my mother-in-law stated, he can't even get insurance for me. There just is no insurance for me. He — he paid a huge hospital bill the other year for me. The kids, he will help them out with their medical bills, even the boys, and they are old enough to take care of themselves, but he still helps out.

As far as the business is concerned, Your Honor, we have — we have always worked together. As far as Mr. Dunne saying that he involved me, well, Your Honor, Don and I have been working together since we got married, 21 years ago. Now, if it is wrong to be helping your husband, I don't understand. The boys — he says he involved them. One of them doesn't even work for us. He did, but he works someplace else now. The other one is a salesman in the store. I can't see where that is wrong. To me it seems good that sons work with their father. Don's worked with his father all these years, and I think it is great that the boys can work with Don.

As far as involving his father, his father is retired. He goes over to the warehouse once in a while because he likes to keep his hand in and see what is going on, but he's retired, Your Honor. He's not in the business, and you can see how my mother-in-law — I mean, we're very, very close, the whole family. I can honestly say my in-laws are like parents to me because my parents are dead, and just — Don is just the type of person that holds a family together. I mean, he — he just — he's in the center of our — our family. Very truthfully, I don't think it was very proper for Mr. Dunne to do what he did in front of my daughter. To tear a father apart in front of his little girl is kind of — it's a little bit rough, and Don doesn't deserve it because he doesn't do anything but take care of these kids. He gives them the best education he can. He will give up anyting in order to give them something,

and I just — I don't understand what they are trying to do, Your Honor, because he really is a very, very decent man.

The business — he was saying that the letters were from friends. I beg to differ with you Mr. Dunne, but they were not from friends. Most of them were my husband's business acquaintances. Actually, a couple of them are from his competitors. He actually helped his competitors set up their businesses; helped them out, gave them pointers on different things. He — they all — they like him. I can't find one person who doesn't like him. Our employees like him. His competitors like him. The salesmen also — they volunteered to send those letters in. It wasn't a matter of even asking them. They were willing to come up with Don, but Don didn't want to bring them for the simple reason he was trying to take them into consideration, being the week before Christmas, it's their very busy season, and he didn't want to take them away from their businesses or their homes at this time of the year. There were about twenty people willing to come up to testify, and they were his competitors, and the salesmen that he deals with, and they're independent salesmen, salesmen from large companies. This is just the way he's done business. I know Your Honor isn't from Florida, but down there, it is just a common thing to deal with people from up in the north. They sell out their stuff when their season ends, and we buy it. I can't see anything wrong with that. It helps them; it helps us, and this is what we really thought Mr. Bishop was. I swear this is what we thought he was, an independent salesman. This is what he represented himself as. It isn't a matter of Don setting up something, when he didn't even know the man. We have never been to Baltimore before this Court told us to come. In fact, we lived in Ohio, but that's as far north as we have ever been, and as far as having gotten a reference from somebody in South Carolina, we have never even been in South Carolina. We don't know

anybody in South Carolina, and I think, if Mr. Dunne was really thinking straight, he would realize that — I think a man who investigated him, and doesn't even know him, but investigated him, is not going to make up something. We had nothing to do with what this man wrote, as Your Honor knows, we couldn't. We didn't even know what he wrote. He spoke to Don and I. He spoke to my father-in-law. He — he just — we just gave him the facts, and let him go. We told him to investigate as far back as he wanted. We didn't tell him what to say. You know we couldn't. So, for Mr. Dunne to say that this was written — it sounds like it was written by our lawyer, that's not right. I don't think it's right at all.

I appreciate Your Honor letting me say these things because I really don't know what I'm going to do without Don — I'm sorry. It's just — he just is the center of our home, and our family, and our business. He really is.

His own brother — he's got a 19 year old brother who looks up to him. We — we treat Ron like we do one of our own. It's just like we've got three boys instead of two. The whole family is just that close. We only live a couple of blocks away, and we are constantly with each other.

I'm sorry, Your Honor. I just can't see tearing a family apart like this, and we've really — Don has suffered so much the last six months, Your Honor, he's got high blood pressure, and it is just — I even have to remind him to take his medicine. He is so concerned with helping other people, and doing the right thing — he doesn't even remember to take care of himsef. I can't see where this is the mark of a criminal, Your Honor, I really can't, and I beg to tell Mr. Dunne, I think I know my husband a little better than he does.

I don't — I don't know what else to say, Your Honor. I'm sorry.

THE COURT: Thank you, very much.

THE WITNESS: Thank you for the opportunity.

(Witness excused.)

MR. STONE: Your Honor, this is the defendant's father, Mr. Lloyd Schmidt.

LLOYD SCHMIDT,

was called as a witness, for and on behalf of the Defendant, and having been first duly sworn, testified as follows:

THE CLERK: Please state your full name for the record.

THE WITNESS: Your Honor, I am Lloyd Schmidt. I'm Don's father, and Don and I worked together for — well, all of our lives, especially in the meat business. He was with me all the time, and always a loyal son, and he was always honest, and truthful. I could trust him with anything that I had; and we have been together a long time, and I know my son wouldn't do this thing that he's accused of if he had known that this merchandise was stolen merchandise.

He's very religious. He's a good boy, and there isn't too much I can say more than what my wife, and my daughter-in-law said. It is just a shame this happened. I know it would never happen again because he's a loyal, I think —

THE COURT: I don't want to create a painful situation for you, sir, but why did you help your son destroy and dispose of the evidence in the case?

THE WITNESS: At the time we — I did that, we were trying to — after we knew this stuff was stolen, we was trying to get rid of it, that's all; and I didn't want him to get in any trouble, and I didn't want the business to get in any trouble. It is one of those things, that we didn't know until afterwards that the stuff was stolen, and I said to Don, I says, let's go to the F.B.I., or let's go to the police, and report this; and Don says, no, they threatened my life, and he said, Dad, I can't do that. He says, what if they do something to my daughter or

my wife, and I says Don, I don't — I don't think they would do that. Let's go over, and he says, no. He said, I'm afraid, and so that was the main reason we didn't report it. We should have reported it. I know it should have been reported, but I guess, we made a mistake. We're sorry that we did, Your Honor, and I know it will never, ever happen again.

I'm 67 and I never — this is the first time I have been in Court, so I guess, may be, all of us were nervous about it. It is one of those things that I know will never happen again. I hope you will forgive us.

Thank you, Your Honor.

THE COURT: Thank you, sir. You may take that with you, if you choose, sir.

MR. STONE: You can take that water.

THE WITNESS: Thank you.

MR. STONE: Your Honor, if I could briefly respond, I know the Court has read the sentencing memorandum that has been provided both to the Government, and to Your Honor. I would, of course, point out two things: Number one, Your Honor also has had the benefit of a presentence investigation prepared at the direction of the Court, by the Probation Office. If the Government — in all fairness, we gave them everything we were going to say, it would seem that in all fairness, that anything they wanted to say, so we have an opportunity to rebut it, should have been in the presentence investigation. Of course, it was not.

Secondly, Your Honor, again, this becomes somewhat of a contest as to who is telling the truth. There is no question that Mr. Schmidt, as I said, has done wrong and should be punished. Yet, the question in my mind, most respectfully, is the type of punishment and the form of punishment.

THE COURT: Why don't you address it?

MR. STONE: We have asked, Your Honor, as to probation for this reason — for the reasons set forth in the

memorandum. Number one, that the man has never been arrested, never been in any trouble with the law before. The criteria that is adopted by the model appeal code, I think the defendant meets that criteria. The defendant did not contemplate his criminal conduct, or trial, or threaten serious harm. The defendant has no history of prior delinquency, or criminal activity, or has led a law-abiding life for a substantial period of time before the commission of the present crime. The imprisonment of the defendant would entail excessive hardship to himself or his dependents.

We would respectfully suggest to the Court that confinement for a period of incarceration would do the defendant absolutely no good, nor society any good. I think Your Honor has seen from the emotional out-charge today, that you certainly won't ever have a problem with Donald Schmidt ever appearing in front of Your Honor again.

So the question is, how can we punish Donald Schmidt? Well, most respectfully, I think Donald Schmidt has already punished himself. He's extremely remorseful. He's extremely repentent. I also point out that Your Honor — if for some reason, Your Honor, for some reason, cannot give probation, there are alternatives, as the Court knows, under 18, I believe it is 3651. Your Honor can give him a split sentence, where you give him a period in a jail-type institution, suspend a period of incarceration, and then recommend a community release program, and a work furlough.

I had another case, Your Honor, and I took the liberty of bringing the actual judgment from the Southern District, where a judge did that. He imposed a period of incarceration —

THE COURT: We are very familiar with that, the Fourth Circuit, with all due respect to the Fifth Circuit, we have several of those things.

MR. STONE: I'm sure you are. The only reason I mentioned it is Mr. Schmidt is from Florida. There is a program in the Southern District, in Florida, where Your Honor would permit him, if he were recommended to this community in a work furlough and half-way house program, where he works at his business during the day, and is incarcerated in the institution at night; and most respectfully, I believe that would be an alternative to the Court, if Your Honor feels that probation is out of the question, in this case. This way, it accomplishes what I think the Court wants to. I think the purpose of sentence certainly is to punish, but it is the same example, Your Honor, you can swat a fly with a fly swatter, you don't have to use a sledge hammer to kill a fly; and I think a lengthy period of incarceration would certainly be a sledge hammer. The Probation Office itself, Your Honor, has recommended to you in its public portions of its report, that a lengthy period of incarceration is not required.

THE COURT: What is the definition of lengthy?

MR. STONE: My opinion, Your Honor?

THE COURT: I don't know who else's I could get.

MR. STONE: I think anything over six months, in this particular case, would be extremely lengthy to Mr. Schmidt. I think that Your Honor could accomplish the aims of sentencing by a period of ninety days in a community release program with a recommendation of a work-furlough program. I certainly think that would serve as a deterent, Your Honor. You have to remember, this man sits as a convicted felon. He has to carry that around with him for the rest of his life. This man has not had a decent night's sleep since this incident began. A man like Sonny Bishop, where crime is a way of life, he has no conscience. It doesn't mean anything. If you put this man in jail for sixty days, it means something to him. You will never see Donald Schmidt with this kind of rap sheet. You will see him once. You won't see him again.

Your Honor, most respectfully, Mr. Mandel would like to address the Court, then we would like to call on the defendant himself.

MR. MANDEL: Your Honor, I just have a few short words.

THE COURT: Maybe you should start with the accusation made by the Government with respect to your alleged conduct with my law clerk.

MR. MANDEL: Yes, Your Honor. I would most certainly like to address that.

Mr. Quarels, and I were talking. I had related to him what Mr. Schulman had indicated to me, and it was just in passing between the two of us, the case was over with, Your Honor, the man had pled guilty. Mr. Schulman, at one point, said to me, if this case — if this change of venue is granted, the case would never even be prosecuted in Florida. That is all that I related to Mr. Quarels, and I don't think it was in any way expected to be relayed on to you. Mr. Quarels and I have talked, over the period of this case, many times, and we were sitting down chatting about many other things, and in passing, this was mentioned.

I, Your Honor — also, I am sure, and I realize that Mr. Quarels would not have gone out of his way or mentioned anything about the point to you. I was going to not address it at all, but I really resent the accusation. I think Mr. Dunne has talked with Mr. Schulman and knows what Mr. Schulman said to us originally, although Mr. Dunne came in later into the case.

Now, as to Mr. Schmidt, Your Honor, the last six months, we have spent quite a bit of time together. I think that this man deserves probation. I think that absolutely nothing will be gained by incarcerating him. I think he —

THE COURT: What about the element of deterence?

Do you think that letting him out with some slight slap on the hand would deter other people from this kind of conduct?

MR. MANDEL: In this case, Your Honor, I think people who see what has gone on, yes, the element of deterence would be served.

Mr. Schmidt has suffered, and he has suffered very badly. He has been forced to expend great sums of money, which is neither here nor there in a case of type; but this man has suffered. This man's family has suffered. His businesses have suffered. His health has suffered. His wife's health has suffered. To put him in jail is just going to prolong her health. It's going to make her worse. She will have nobody to depend on. She can't depend on a 14 year old daughter to take care of her. The woman is seriously ill. Her husband is the key. She doesn't drive. He helps her. Jail is for two reasons. One is to take a person who is a danger to society — I don't think that is a question in this case. I think the probation department has said Mr. Schmidt is not a danger to society. I think Your Honor can see he is not a danger to society. The other, I think he has learned his lesson. I think it is an ample example for people. They have seen that the F.B.I. did a very good job. They broke this ring. The ring has fallen apart. Sending this man to jail is not going to help at all.

His daughter, who is a teen-ager is going to have no one to look to. The businesses will most probably fail. If the businesses fail twenty-five people will suffer. Many of them will probably end up on welfare. I just don't think that putting this man in jail, and forcing all of these other people to suffer is going to help in any way. I thnk that he's a candidate for probation, and I would hope that Your Honor would give him probation.

THE COURT: Thank you, Mr. Mandel.

MR. STONE: Your Honor, with the permission of the Court, may the defendant address you, personally?

THE COURT: Certainly.

MR. STONE: Thank you, Your Honor.

DONALD SCHMIDT,

was called as a witness for and on his own behalf, and having been first duly sworn to tell the truth, testified as follows:

THE CLERK: Please take a seat, sir.

THE DEFENDANT SCHMIDT: Your Honor, I am not a very good speaker. I am nervous at this time, but Your Honor, I have heard a lot of lies about me here today, in Court, from Mr. Dunne.

Believe me, Your Honor, these lies aren't — I mean he's telling about me are not the truth at all. There is no truth to this stuff. I did make some mistakes, Your Honor, and I made mistakes; I'm willing to pay for my mistakes, but I get upset to hear — when I hear this kind of stuff about my reputation like this, and I can't do nothing about it. I got to sit there and listen to this.

Your Honor, I have been married twenty-one years. I have got a good family. I'm very close to my family. I don't want to be separated from my family, Your Honor. If you could only see fit — if you could only see fit to leave me with my own family, I will never — I promise you, in my heart, I will never make another mistake as long as I live. I will never be back here. I promise.

Please, Your Honor —

MR. STONE: If I may, Your Honor — Donald, tell the Judge about some of these individuals who sent letters in for example, Jerry Gunderson from Spaulding.

THE DEFENDANT SCHMIDT: I get golf equipment Your Honor, from Spaulding Company — the big representative from Spaulding. I was going to bring a couple of my competitors up here to talk to you today, but I didn't want to take them away from their business at Christmas

time. I know what it is like at Christmas time in that business, Your Honor, because I'm in it myself.

MR. STONE: Do you also have letters from others. Ram —

THE DEFENDANT SCHMIDT: I've got letters from major corporations, Ram Corporation. I've got letters from the different companies. I'm all nervous. I can't think, Your Honor. I'm sorry.

THE COURT: I read each and every one of the letters.

MR. STONE: Don, explain to the Judge how you conduct a sporting goods business in South Florida, in the sense that people will sell you merchandise close-outs from —

THE DEFENDANT SCHMIDT: It is a normal thing, Your Honor, for people to come down from up north there in the wintertime, with their stuff from pro shops, and different stores, that they have left over, and they close it out. They buy new merchandise. That's what I wanted my competitors to come up and explain to you today, Your Honor. They do the same thing. All of them down there, buy the same way, and I wanted you to hear it, but like I say, they come down every winter, you get a load of people come down. What they do is buy the merchandise in springtime for the summer months. They make their profit off of what they got, the rest they close out because it is going to be last year's merchandise and they buy new stuff in the spring again; and this is the way a lot of this operates. There is also a lot of close-outs. Your Honor, I bought at auction — State auction in Florida, ninety-one thousand dollars worth of merchandise for sixteen thousand dollars in golf equipment. This was a State auction and we have papers on it.

I bought another auction for about twenty-two thousand dollars worth of golf equipment for five thousand dollars.

This goes on all the time down there, Your Honor, I mean, places going out of business, places doing this and that and the other thing. It is just not an uncommon thing.

MR. STONE: Did you also get credit for your merchandise, that you don't have to pay for?

THE DEFENDANT SCHMIDT: Yes, I did.

MR. STONE: Explain to the Court —

THE DEFENDANT SCHMIDT: The factories, Your Honor, they give you ninety days, 120 days, sometimes as much as six months credit that you don't have to pay for your merchandise any how.

With Spaulding Company, our corporation alone, with Spaulding Company has a hundred and fifty thousand dollar line of credit; and they trust me for that, but now, what—what's happened here, since I've been involved, they feel that the business may fold, since I've been indicted, and so forth, the business may fold. Now, they have cutoff my credit. I've got to pay cash for everything instead of getting that six-month deal on it; and this has gone on with the newspapers, and everything, Your Honor. The Miami Herald, I had to pay cash for any ads I run, where before, I had credit with them. I mean, it's hurt my business, it's hurt my family, and I know I done wrong, and I'm deeply sorry for it, and I will do anything you want me to do, Your Honor.

MR. STONE: Your Honor, just very briefly, your relationship with Sonny Bishop, now when you bought merchandise from him, he signed a receipt: was that correct?

THE DEFENDANT SCHMIDT: Yes. He did. He signed a receipt for it.

MR. STONE: All right, and those receipts have been furnished to Judge Howard: is that correct?

THE DEFENDANT SCHMIDT: Yes.

MR. STONE: Is that the only business—

THE COURT: There is not a receipt that the Court has, that has Sonny Bishop's signature on it, that I find.

THE DEFENDANT SCHMIDT: They were signed Charles Bishop, Your Honor.

MR. STONE: They should have been furnished to you as part of the exhibit, Your Honor, I believe.

THE COURT: It is not a big point, I suppose, but the receipt dated, January the 5th, 1980, has no signature whatsoever. The one dated, February the 21st, 1980, has no signature whatsoever. The one dated March the 10th, 1980, has no signature at all. I don't think that's a matter of great moment, but I just point it out.

MR. STONE: Judge, my secretary—

THE DEFENDANT SCHMIDT: Your Honor, can I speak to you? Those yellow slips are what we call receiving slips. There should be receipts with those slips.

MR. STONE: I believe the error is mine, Your Honor. My office—I directed my secretary—if I may approach the bench, or give these to the clerk, Your Honor.

These are receipts dated May 14th, signed by Mr. Bishop; March 8th, by Mr. Bishop, January 4th. Those are the ones that I was referring to. I'm sorry, Your Honor. There is another one as to February 20th. Those are the receipts that I was referring to. I thought I instructed my secretary to send you those, and apparently, she had sent you, as part of the exhibit, some other receipts.

Do those represent the business dealings you had with Mr. Bishop?

THE DEFENDANT SCHMIDT: Yes. They do, Your Honor.

MR. STONE: What is the total merchandise on that; do you recall, approximately?

THE DEFENDANT SCHMIDT: I'm not sure of the total merchandise on that. I'm not sure of the total amount of it.

MR. STONE: About what amount were you buying between wholesale and retail from him?

THE DEFENDANT SCHMIDT: About thirty-three percent, uh, less.

MR. STONE: In your business dealings with Mr. Bishop, you really didn't make very much money at all, did you?

THE DEFENDANT SCHMIDT: No, Your Honor. I import merchandise from overseas. I import gloves, for instance, all leather golf gloves for two and a quarter. I was paying Mr. Bishop two dollars a piece for them. I buy Titlist balls from the factory. With my rebate, they cost me eight, fifty; I was paying Mr. Bishop eight dollars for those. I mean, things of this nature, Your Honor. It really was not that much money as far as the difference involved in what I was getting from the factories.

MR. STONE: Don, the Government made an allegation that you are a first offender because it is the first time you got caught; it that an accurate statement?

THE DEFENDANT SCHMIDT: No, Your Honor, it is not. I tried to explain before, I did not do these things that the Government allegated (Phonetically).

THE COURT: Let me simply say the Court is not making its decision in this case based on the allegations or statements made by the Government. I have reviewed this matter thoroughly, so you need not worry too much about what has been said by way of argument, as far as the Government is concerned. The Court has the responsibility of determining what will and will not be done.

THE DEFENDANT SCHMIDT: Yes, Your Honor.

THE COURT: I will discharge that responsibility when the time comes.

THE DEFENDANT SCHMIDT: Thank you, Your Honor.

THE COURT: Is there anything else you would like to say?

THE DEFENDANT SCHMIDT: No, Your Honor, Thank you.

THE COURT: You may step down, sir.

THE DEFENDANT SCHMIDT: Thank you, Your Honor.

THE COURT: Mr. Stone, if I understand you correctly, you said at the end, you wanted to reserve some time for yourself.

MR. STONE: Judge, very frankly, I think everything has been said. I know that Mr. Schmidt has pled guilty. He has admitted his guilt. He stands ready to be sentenced. There is no question that there are basically three reasons for punishment, rehabilitation, deterrence, and retribution. I certainly think, that as to retribution, there is no reason in this case for that purpose. As to rehabilitation, there is no question that Mr. Schmidt is going to rehabilitate himself. As to deterrence, I agree with the Court, that that has to be a concern, but I think that every case has to be seen individually, Your Honor; and I think that our penal system has shown, by the mere fact of putting a person in jail, that doesn't deter individuals. It has to come—the change of conduct has to come from within, and I think Mr. Schmidt through his family, and through himself has shown you that any kind of conduct that was wrong in the past will be changed, and has been changed; and I ask for your leniency on behalf of my client, Your Honor.

THE COURT: Thank you, very much, Mr. Stone.

Stand up, if you will, Mr. Schmidt.

THE DEFENDANT SCHMIDT: Yes, Your Honor.

THE COURT: Let me advise you that these things do not come easy. It is a responsibility that the Court has to discharge and it is one that I don't relish, to say the least. Let

the record show that this Court has given this matter due consideration. I read the Probation Department report from the Florida probation officer. He does list your attributes, your physical condition, physical condition of your wife, your business history; and gives a general impression, as a probation officer, as to what he thinks about you.

The Court has read that carefully. I have also reviewed the plea agreement in this case, Mr. Stone, your sentencing memorandum, the transcript of May 14th, which probably answers a lot of questions with respect to your statement.

I have also read Dr. Benjamin Torres' medical report, the seventeen letters that have been written on your behalf by your family, friends, and, of course, your business associates. I have listened very carefully today to comments of counsel, both Mr. Stone and Mr. Mandel. I have listened to your statement, and, of course, your father, your wife, and your mother. Probably, there is no one that suffers more in a case like this, than your parents, particularly, your mother, and your wife; and the Court is able to empathize and sympathize with them thoroughly.

I am sure that it has been a nightmare since your arrest, and indictment, in this case. I am sure, as your mother says, that you have had a good upbringing, and that you were a good young man, and good boy, when you were starting, and more recently, that you are a good father, and a good husband; and of course, I can look at you and tell that you are a likeable fellow.

I am not too sure, however, that the probation officer, and others in this case, appreciate the magnitude of this operation, and I am not too sure that you don't minimize it in your own mind, Mr. Schmidt, or that your friends understand, or are willing to admit the nature of your character in the past ten years or so. Therefore, I think this whole matter should be put in some kind of perspective, and your role seen in its proper context.

The evidence seems clear to this Court, that we are dealing with a planned conspiracy, with professional conspirators. I find that this matter began in 1972, and lasted through 1980. It involved the funneling of golf equipment from Maryland, Pennsylvania, and perhaps other places, to you, Mr. Schmidt, in the State of Florida. It is estimated, and I feel that there is a loss to victims, and I have heard no one say a word about that today, of over a hundred and forty thousand dollars. I think the Court should, at least, bring that to your attention.

Regarding the individual conspirators in this matter, the Court notes that all but one had criminal records. All but one had served prison time. All but one, and that, again, is you, have antisocial histories; but very frankly, none of these burglars with these histories and criminal records minimizes his participation, places blame on others, presents a more bizzare set of circumstances than you, Mr. Schmidt.

I am inclined to think that you have a propensity for terminological inexactitude. That means, in simple monosyllabic language, it is difficult for me to believe the position you present to the Court. The Court is convinced that you are the hub around which this conspiracy operated, and I note that you offered, according to the record, to buy any delivery of goods, as long as it was not over fifty thousand dollars, and was not taken from the State of Florida; and I think that you engaged in encouraging the continuation of this conspiracy over this almost ten-year period.

The critical question, as far as I am concerned is how to treat a man like yourself who has no criminal record, has no antisocial history, but played a principal role in this particular crime, one far greater than many of the others, that have been involved in this case. How do you treat a man like that?

I don't think anyone is more culpable in this conspiracy than you, other than, perhaps, Sonny Bishop. Defense counsel has offered this Court direction as to when, and how,

the Judge should use probation; and I appreciate that. He has given me various factors under the model penal code, which suggests that non-incarceration is proper; and I appreciate that. He has also advised that you, Mr. Schmidt, are not a threat to the community, that the cost of maintaining a federal prisoner is about seventeen thousand dollars, that your conduct is an indication of poor judgment; and I had to ask myself how many times was poor judgment exercised. He points out, and of course, you and the rest of the family point out, that you have all suffered enough. You have, of course, brought to my attention the health and medical problems that you and your wife have.

It all boils down to the fact that a prison sentence in the minds of your attorneys, and those that have testified today will be extremely destructive on you.

On the other hand, I think the Court would and should make three general observations. The first is, that this type of nonviolent crime, which I find that you have committed, is generally committed by respected and successful persons, those who stand clear of the dirty work, but really clean up while they stand aside. Of course, you have placed yourself in a position to lose most because you had the most in the beginning, and I think that those, like yourself, who get into this kind of situation, do so not because so much of bad judgment, but because of greed, pure and simple greed.

The second thing I would like to point as a general observation is, that this kind of crime with which you have been charged, and convicted, may have been taken too lightly, by too many of us.

I would like to advise you that it is a part of a two hundred, billion dollar business, that takes place across this country. Well over twice as much money is lost to the community, and to individuals than is lost to street crime. So, I don't know whether I can agree thoroughly with your attorney, that you are not a danger to society.

The third thing that I would like to point out to you is the general proposition that in 1979, according to the data in the Fourth Circuit, dealing with crimes like this, there have been eleven individuals convicted, not one has gotten probation; not one has gotten a fine only, and the average sentence that has been given to those individuals who have been convicted is forty-four months. So this Bench, this Circuit, is beginning to recognize the importance of dealing with people who find themselves operating as fences.

Let me turn now to the last stage, and that is the sentencing in this case. I have no desire to destroy your business or your family. I think I do have a duty, however, to be equitable, to treat those parties that are involved in this case with equity, as best I can under the cirumstances. No one who has been convicted and has come before this Court in this conspiracy, has walked away without some kind of sentence; and Mr. Schmidt, you ar enot going to be an exception. Therefore, it is ordered and adjudged that you be committed to the Attorney General, or to his authorized representative, to serve a period of three years, under the provisions of 18 U.S.C. Section 4205B2. The Court recognizes that you have a business. The Court will entertain the suspension of the execution of that sentence for a reasonable period of time, for you to get your business in order.

Let me finally advise you that you have a right of appeal in this matter, but if you want to appeou must execute your rights within ten days from the recording of the judgment in this case, and be advised, Mr. Schmidt, that the judgment will be recorded today.

Mr. Stone.

MR. STONE: Your Honor, if it please the Court, would Your Honor consider suspending a period of that three years pursuant to 183651, and entertain a split sentence in this matter?

THE COURT: The Court has made its ruling with respect to disposition today.

You have a right to file certain requests with the Court. Any requests filed by you or Mr. Mandel will be properly considered.

MR. STONE: Your Honor, I would ask—we have had some discussion with the Government about this. I don't believe they have any objection to this, that this be deferred so that the defendant may report directly to the institution sometime after January 15th of this year.

THE COURT: That is what I alluded to in my conclusion. I recognize that Mr. Schmidt has a business. I also know that he has a father that knows something about that business. I think he also has a brother that knows something about that business, is that it, or a son? At any rate, I think it is only fair to see that he gets a fair opportunity to put his business in order. I stand ready to take your recommendation as to how long it will take.

MR. STONE: Your Honor, may I have a moment to discuss with my client that matter, frankly, his length of—

THE COURT: Maybe it would be wise if we would adjourn this session. You could take whatever time it takes to talk with your client. I will see you and counsel in chambers.

MR. STONE: Thank you, very much, Your Honor.

(Proceedings adjourned.)

(The following proceedings were had in open court:)

MR. DUNNE: I have one final matter that does not relate to this case.

At this time the Government would move to tender an Order of Dismissal asking that this Court dismiss, in the case

of the United States of America v. Donald Schmidt, Criminal Number JH-80-0274, the following Counts, I, II, III, IV, VI and VII.

This is pursuant to the plea agreement; and due to an oversight, it was not done at the time of Mr. Schmidt's sentencing, for which I apologize.

(Proceedings adjourned.)

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Estelle Schmidt .....
Elizabeth Schmidt .....
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Donald Schmidt .....

IN THE
UNITED STATES DISTRICT COUT
FOR THE DISTRICT OF MARYLAND

United States of America,	)	
	)	
vs.	) JH-80-0274	Criminal
	)	
Donald Schmidt.	)	

Baltimore, Maryland
December 31, 1980

The above-entitled case came on for hearing before His Honor, Joseph C. Howard, at 10:25 a.m.

APPEARANCES

For the Government:
Richard Dunne

Reported by:
Julie T. West

REPORTER'S CERTIFICATE

I, Julie T. West, Official Court Reporter for the United States District Court for the District of Maryland, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and accurate transcript of the proceedings made in the aforementioned and numbered case on the date hereinbefore set forth, and I do further certify that the foregoing transcript has been prepared by me, or under my supervision.

Julie T. West
Official Court Reporter